Supreme Court of the United States.

No. 172.—October Term, 1903.

The United States, Appellant.
vs.
The Commonwealth Title Insurance and Trust Company, Trustee.
} Appeal from the Court of Claims.

[April 4, 1904.]

Mr. Justice McKenna delivered the opinion of the Court.

The question involved in this case is whether a mortgagee who has foreclosed his mortgage and purchased the property mortgaged at sheriff's sale under a decree of the court is an assignee of the owner of the land within section 2 of an act of Congress approved June 16, 1880. (21 Stat. 287.)

The section reads as follows:

"Sec. 2. In all cases where homestead or timber-culture or desert-land entries or other entries of public lands have heretofore or shall hereafter be cancelled for conflict, or where from any cause the entry has been erroneously allowed and cannot be confirmed, the Secretary of the Interior shall cause to be repaid to the person who made the entry, or to his heirs or assigns, the fees and commissions, amount of purchase money and excesses paid upon the same, upon the surrender of the duplicate receipt and the execution of a proper relinquishment of all claims to said land, whenever such entry shall have been duly cancelled by the Commissioner of the General Land Office, and in all cases where parties have paid double minimum price for land which was afterwards found not to be within the limits of a railroad land grant, the excess of one dollar and twenty-five cents per acre shall in like manner be repaid to the purchaser thereof or to his heirs or assigns."

It is provided by the rules of the General Land Office that application for repayment under this section shall be accompanied by a duly executed deed, where the title has become a matter of record, relinquishing to the United States all right and claim to the land under the entry or patent.

The case is this: In 1888 one Amanda Cormack made settlement upon one hundred and sixty acres of land in the Helena land district of Montana, and paid $200, being at the rate of $1.25 per acre. Subsequently, May 10, 1890, she borrowed from the Northwest Guarantee Loan Company $300, and gave her note therefor, due in three years, and secured the note by a mortgage on the land. On January 9, 1890, the said company assigned the note and mortgage to the Commonwealth Title Insurance Company, the appellee. The instruments were all duly recorded.

July 8, 1890, the General Land Office informed the local office that 120 acres of the land entered had been recommended and selected for reservoir purposes, and on August 16, 1894, the Commissioner of the General Land Office cancelled all of the land entered except the N. W. ¼ of the N. E. ¼ of section 28, as being in conflict with the Box Elder Reservation system. Subsequently appellee brought suit to foreclose said mortgage, and such proceedings were had therein that on August 16, 1897, the mortgaged property was duly sold to appellee for $200, and a sheriff's deed duly executed and delivered to appellee.

Thereafter appellee applied to the Commissioner of the General Land Office for the repayment to him of the sum of $150, being $1.25 per acre paid by Amanda Cormack for the 120 acres cancelled. The application was refused by the Commissioner. The Secretary of the Interior reversed the ruling and allowed the repayment upon the relinquishment by appellee of all claim to the land so cancelled. The relinquishment was duly made and the claim was transmitted to the Treasury Department for final settlement. The Auditor of that Department for the Interior Department passed the claim, but the decision was reversed, and the claim was finally disallowed by the Comptroller.

The Court of Claims rendered judgment for appellee for the amount claimed, to wit, $150. (37 Ct. of Claims, 533.)

Section 2 of the act of 1880 was considered by this court in *Hoffield* v. *United States*, (186 U. S. 273.) We there distinguished between a voluntary assignment and one created by operation of law. The former "takes the property," it was observed, "with all the rights thereto possessed by his assignor, and if he has paid a valuable consideration, may claim all the rights of a *bona fide* purchaser with respect thereto."

Is a mortgagee within the principle? A brief definition of a mortgage under modern law is not easy to make. At common law a mortgage was a conditional conveyance to secure the payment of money or the performance of some act, to be void upon such payment or performance. By more modern law and under the statutes of many States a mortgage is a mere lien upon land. Its dominant attribute is security, but nevertheless it must be regarded as "both a lien in equity and a conveyance at law." (Pomeroy, § 1191.) The interest of a mortgagee in the land is therefore conveyed to him by the mortgagor, and even if under the laws of Montana a mortgage is primarily security for a debt and creates a lien only it is a lien which may become the title. The decree of the court conveying the title is, of course, the act of the law, but it is the act of the law consummating the act of the mortgagor. And the sale and deed relate to the date of the mortgage, conveying the title which was then possessed by the mortgagor. And for the purpose of this case we need go no farther in elaboration of the legal attributes of a mortgage. We regard the word "assigns," as

used in the statute, as one who derives from the original entryman by the voluntary act of the latter. We regard also the right conferred by the statute as attaching to the land—a kind of warranty upon the part of the United States to restore the consideration paid for the land if the contingencies expressed in the statute occur.

It is insisted, however, that all of the conditions of the repayment have not been complied with; that there has not been a surrender of the duplicate receipt as provided by the statute. (*Hoffield* v. *United States*, *supra*.) There is certainly no direct finding to that effect. There is a finding, however, that the Secretary of the Interior ordered repayment "on the relinquishment by the claimants of all claim to the land so cancelled," and a further finding that the relinquishment was made "as required by the rules and regulations of the Land Office."

We must presume that the Secretary did his duty and exacted the performance of all the statute required, and infer, therefore, that he had received the duplicate receipt, and all that was necessary to fulfill the conditions of the statute and revest the title in the United States to the land cancelled.

Judgment affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.